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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

DOCKET NO. 72-1578

AUDREY S. HARTEL, individually and as Administratrix of the Estate of JOHN HARTEL, Deceased,

Petitioner,

—against—

THE LONG ISLAND RAIL ROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

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June 28, 1973

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The Brief for the Respondent in opposition to the Petition makes it necessary that Petitioner refer to matters in the Record not originally considered essential. It was the effort of Petitioner to demonstrate most succinctly that there was sufficient evidence tendered by Petitioner to require jury determination as to whether or not the holdup was foreseeable by Respondent under all the circumstances.

Accordingly, the only evidence discussed thus far was culled from the opinions in the Courts below. This preoccupation with brevity may have de-emphasized the substance and persuasiveness of Petitioner's tenders to the issue of foreseeability.

Exhibit 3 (R. 155, 156) visualizes through a camera's eye the isolation of the Mineola Station from contacts with the surrounding community, particularly on an early Sunday

morning, making it a logical candidate for a holdup in the metropolitan area of New York.

Plaintiff's Exhibit 11, which was also erroneously and prejudicially excluded by the Trial Judge, is a confession by one of the perpetrators of the holdup. In pertinent part that confession states (R. 171):

> "Woodie [another perpetrator] said he had this job planned for two months, he knew what time the man got to the train station. He said that there might be two men but one comes early and one comes later. Woodie said the first man gets in about twenty minutes to seven in the morning. He said we would have to get there about six o'clock. Woodie said there would be about two grand for each one of us."

If admitted then, this evidence would tend to show at least that this was not a spontaneous holdup and, relevantly to the foreseeability issue, that the danger to decedent came about because predators were able to identify in advance that the Mineola Station was an appropriate target for a holdup.

It is obviously arguable that if criminals could calculate that the Mineola Station was vulnerable to a holdup, a reasonably prudent railroad might also have foreseen that possibility and might reasonably have made the inexpensive changes suggested by the decedent's union representative to reduce the hazard to ticket agents at least at that particular place, even though the request for changes was general.

The confession excluded by the Trial Court was admitted into evidence at the murder trial of the confessor, but Judge Levet excluded the confession from this civil trial, citing *Donnelly* v. *United States,* 228 U.S. 243. Petitioner, by

deposition, had previously established the refusal of the confessor to answer any questions in this case without counsel to advise him of his rights, and the confession should have been admissible (Rule 43, Federal Rules of Civil Procedure, and *People* v. *Brown*, 26 N.Y.2d 88).

It is true that Hartel's death was caused in part by the criminal acts of strangers. Respondent leans heavily on an historic presumption that third parties will behave lawfully (Respondent's Brief, p. 4). Contemporary history in the metropolitan area of New York suggests that this presumption is unfortunately becoming a slim reed. In the vicinity of this accident the presumption among all prudent people is that property must be guarded and protected against theft. It is the genius of the common law that it can adapt to human experience. Presumptions that are archaic in fact should become at least weakened for judicial purposes.

It is specious for Respondent to argue that no evidence relating to the foreseeability of a criminal attack at the Mineola Station was excluded and that none was offered. The Respondent had admitted to 10 holdups of its own ticket offices, 9 of which occurred within 2 years preceding the Hartel tragedy (Exhibit 13 for Identification, pp. 179-183). Although 4 of these holdups had occurred at comparable stations to Mineola within a radius of 7 miles of the Mineola Station, the Trial Court excluded from the record each and every incident. This evidence would have tended to show that holdups of Long Island ticket agents in the area were on the increase to the knowledge of the defendant. The relevancy of this truth should be beyond dispute and should be admissible without any other foundation. The defendant's knowledge of these holdups, rather than the details, was germane.

It is hornbook learning (Devitt and Blackmar §89.05) that the amount of care exercised by a reasonably prudent

person varies in proportion to the danger known to be involved. It is singularly appropriate for a jury to be privy to the knowledge of danger available to the defendant in order to estimate whether or not the defendant responded prudently.

In case after case this Court has hammered out the proposition that in F.E.L.A. cases questions of causation between negligence and damage are for the jury. *Lavender* v. *Kurn*, 327 U.S. 645 (1946); *Tennant* v. *Peoria P.U.R. Co.*, 321 U.S. 29, 64 S.Ct. 409 (1944); *Ellis* v. *Union Pacific R.R.*, 329 U.S. 649 (1947); *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957).

It is disappointing then to find that the prevailing opinion in the Second Circuit suggests that even if the steel shutter danger was eliminated "or the peephole was put in which might have enabled the agent to observe persons in the waiting room, these measures would not have protected him from assault and murder."

This is a judicial trespass in precisely that area preserved for juries in F.E.L.A. cases according to the teachings of this Court.

It should also be clear, contrary to the Brief in Opposition and the opinion of the Court of Appeals, that the suggestions for eliminating the danger from opening the steel shutter from the waiting room, and for a peephole were not appellate afterthoughts by the Petitioner. These were suggestions conveyed to the defendant before the holdup and the death of John Hartel, the Ticket Agent "for all ticket offices, including Mineola" (R. 86, 92, 93, 95).

As suggested in the original Petition, this case does represent the deprivation of the right to a jury trial, albeit in a sophisticated manner with the trappings of pseudo-authority. It accomplishes that deprivation by the introduction of an unprecedented rationale for F.E.L.A. cases, to wit: the narrow concept of specific advance notice as a condition precedent to liability. This rationale may be appropriate in sidewalk slip and fall cases against municipalities, where the public policy is to insulate the municipality, or excusable in dog-bite cases where the stakes are generally low. It would be most regressive to permit the introduction of the requirement of specific notice to shield employers from the liability imposed by social legislation with the humanitarian objectives of the Federal Employers' Liability Act.

A writ should be granted.

Respectfully submitted,

ARNOLD B. ELKIND
Attorney for Petitioner

June 28, 1973